

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

EMSAT ADVANCED GEO-LOCATION TECHNOLOGY, LLC	)	CASE NO. 4:08 CV 00822
	)	
and	)	JUDGE JOHN R. ADAMS
	)	
LOCATION BASED SERVICES LLC,	)	
	)	
Plaintiffs/Counterdefendant,	)	
	)	
v.	)	
	)	
AT&T MOBILITY LLC f/k/a	)	
CINGULAR WIRELESS LLC	)	
	)	
Defendant/Counterclaimant.	)	

**DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
STRIKE PARAGRAPHS 33 THROUGH 37 OF THE COMPLAINT**

Defendant AT&T Mobility LLC f/k/a Cingular Wireless LLC ("AT&T Mobility"), by and through its counsel, hereby moves pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing the allegations contained in paragraphs 33 through 37 of the Complaint For Patent Infringement ("Complaint"). These allegations involve an unissued published patent application, U.S. Patent Application Pub. No. 2008/0014965 A1 ("the '965 Publication"). In the alternative, AT&T Mobility moves to strike paragraphs 33 to 37 pursuant to Rule 12(f) because they contain immaterial and impertinent matter.

As fully set forth in the accompanying memorandum in support of this motion, AT&T Mobility cannot infringe any claims of the '965 Publication as a matter of law because no patent has issued from it. Unless and until this application issues as a patent, plaintiffs do not have any property rights to assert. Similarly, plaintiffs cannot assert a valid claim for so-called "provisional rights" under 35 U.S.C. § 154(d) unless and until: (1) the '965 Publication issues as

a patent and (2) the issued patent's claims are substantively identical to the invention claimed in the published application. Accordingly, paragraphs 33 through 37 of the Complaint fail to state a claim upon which relief can be granted. Alternatively, these paragraphs should be stricken because plaintiffs' allegations regarding the unissued '965 Publication are immaterial and irrelevant.

Dated: July 25, 2008.

By: /s/ Charles B. Lyon

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion to Dismiss, or in the Alternative Strike, Paragraphs 33 through 37 of the Complaint was filed electronically this 25th day of July, 2008. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

/s/ Charles B. Lyon  
One of the Attorneys for Defendant